

**SUPERIOR COURT OF CALIFORNIA**

**County of San Diego**

**DATE: June 29, 2005                      DEPT. 71                      REPORTER A:                      CSR#**  
**PRESENT HON. RONALD S. PRAGER                      REPORTER B:                      CSR#**  
**JUDGE**

**CLERK: K. Sandoval**

**BAILIFF:    REPORTER'S ADDRESS: P.O. BOX 120128**  
**SAN DIEGO, CA 92112-4104**

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JUDICIAL COUNSEL  
COORDINATION PROCEEDINGS  
NO. JCCP 4221  
1,11,111, AND 1V

TITLE [Rule 1550(b)]  
NATURAL GAS CASES

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**INDEXING**

**RULING ON SUBMITTED MATTER**

**This Matter was taken under submission on June 21, 2005. The Court has reviewed the evidence in light of the arguments of counsel and the applicable law. The Court's tentative ruling of June 20, 2005, is modified and the Court rules as follows.**

**The General Demurrers of Defendants The Williams Companies, Inc., Williams Power Company, Inc., Duke Energy Trading and Marketing L.L.C., Duke Energy Field Services and Duke Energy North America (Defendants) to Class Plaintiffs' Master Complaint and Plaintiff City of Los Angeles Department of Water & Power's Complaint are OVERRULED.**

**The Motion to Strike Plaintiffs' allegations against Defendants Reliant and Zanaboni is DENIED.**

**A demurrer is a pleading used to *test the legal sufficiency* of other pleadings, it raises issues of law, not fact, regarding the form or content of the opposing party's pleading. (See: CCP sections 422.10 and 589) For the purpose of testing the sufficiency of a cause of action, the demurrer admits the truth of all material facts properly pleaded. The sole issue raised by general demurrer is whether the facts pleaded state a valid cause of action - not whether they are true. No matter how unlikely or improbable, the allegations must be accepted as true for the purpose of**

ruling on the demurrer. (See: *Serrano v. Priest* (1971) 5 Cal.3d 584; *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593)

Defendants demur to Plaintiffs' Master Complaint and the City of Los Angeles Department of Water & Power's complaints on the grounds that the pleadings do not state sufficient facts to constitute the claims asserted therein because the Court does not have jurisdiction over the action. Defendants' contend Plaintiffs' claims are preempted by exclusive federal jurisdiction, field & conflict preemption, and the filed rate doctrine.

### EXCLUSIVE JURISDICTION

"The Supremacy Clause, U.S. Const., Art. IV, cl. 2, invalidates state laws that 'interfere with, or are contrary to, federal law.'" (*Moldo v. Matsco, Inc. (In re Cybernetic Servs.)* (2001) 252 F.3d 1039, 1045, quoting, *Hillsborough County, Fla. v. Automated Med. Labs., Inc.* (1985) 471 U.S. 707, 712) State law is preempted whenever Congress, either explicitly or implicitly expresses an "intent to occupy a given field to the exclusion of state law." (*Schneidwind v. ANR Pipeline Co.* (1988) 485 U.S. 293, 299-300) "Complete preemption is rare. In fact, the federal courts have rarely identified legislation which has been found to completely preempt state jurisdiction." (*In Re: Western States Wholesale Natural Gas Antitrust Litigation, et. al* (D. Nev. 2004) 346 F.Supp.2d 1123, 1131, internal citations omitted.) The Supreme Court of the United States and the Supreme Court of California have consistently held that the Federal Power Act (FPA), the Natural Gas Act (NGA), and the Natural Gas Policy Act do not preempt antitrust claims. (*California v. Federal Power Commission* 369 U.S. at 485, *Otter Tail Power Co. v. United States* 410 U.S. at 366, and *Younger v. Jensen* (1980) 26 Cal.3d 397, 409)

The provisions of the Natural Gas Act (NGA) expressly exempt from federal jurisdiction certain gas transactions including those involving the sale or transportation for resale in interstate commerce of natural gas received within or at the boundary of a State if all the natural gas is ultimately consumed within the state, or to any facility used for transportation or sale, provided the transaction is subject to regulation by a State commission. (15 U.S.C. section 717(c).) "The matters exempted from the provisions of this Act . . . by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States." (*Id.*) The FERC's jurisdiction does not include the first sale of the gas to the pipeline or the last sale to the ultimate consumer. (*Order No. 644*, 2003 WL 22758080 (F.E.R.C.) at \*5 [105 FERC P 61,217]; 15 U.S.C. section 171(b) [since repealed].) (*E & J Gallo Winery v. Encana Energy Services, Inc. et. al.* (2004) CV F 03-5412 AWILJO, Memorandum Order and Opinion Denying Defendants' Motion to Dismiss All Claims and Denying Motion to Strike, p. 8:4-8)

Because Congress carved out certain transactions from the NGA, there was an intent to leave certain transactions within the jurisdiction of the states. “Congress has endowed FERC with plenary power within its jurisdiction, *Snohomish*, F.Supp.2d at 1076, but that jurisdiction is not co-extensive with the whole of the natural gas marketplace. FERC’s jurisdiction ends at, and does not include, retail sales. *Cities Services Gas Co.*, 500 F.2d at 453.” (*E & J Gallo Winery v. Encana Energy Services, Inc. et. al.*, (2004) CV F 03-5412 AWILJO, Memorandum Order and Opinion Denying Defendants’ Motion to Dismiss All Claims and Denying Motion to Strike, p. 17:14-17) Consequently, Plaintiffs claims are not preempted by exclusive federal jurisdiction.

#### FIELD & CONFLICT PREEMPTION

“[I]n the absence of express preemptive text, Congress’ intent to preempt an entire field of state law may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress ‘left no room’ for supplementary state regulation (field preemption).” (*Moldo v. Matsco, Inc. (In re Cybernetic Servs.)* (2001) 252 F.3d 1039, 1945, quoting *Rice v. Santa Fe Elevator Corp.*, (1947) 331 U.S. 218, 230). As noted above, Congress expressly carved out certain gas transactions from federal regulation. Thus, federal regulation of the natural gas markets was insufficiently comprehensive to make a reasonable inference that Congress left “no room” for state regulation of Plaintiffs’ claims. Therefore, Plaintiffs claims are not preempted by field preemption.

“State law also is preempted ‘when compliance with both state and federal law is impossible,’ or if the operation of state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress’ (conflict preemption).” (*Moldo, supra* quoting *G.S. Rasmussen & Assocs. v. Kalitta Flying Serv., Inc.* (9th Cir. 1992) 958 F.2d 896, 903-04.) The state laws implicated by Plaintiffs’ complaints are complimentary to FERC regulation. This is so because state laws provide a remedy for the alleged wrong where FERC provided none. FERC stated there was no violation of the blanket certificates because FERC had no “explicit guidelines or prohibitions” for the alleged improper trading practices. Consequently, FERC determined a remedy was inappropriate. (FERC, *Final Report on Price Manipulation in Western Markets, Fact Finding Investigation of Potential Manipulation of Electric and Natural Gas Prices*, Docket No. PA02-2-000, March 2003, pp. ES-5; 105 FERC 61,008 at p.3-15, *Reliant Order* [. . . Reliant’s gas trading at Topock contributed to the increased price of natural gas in California. As the Final Report notes, the trading activity of Reliant’s gas buyer was not prohibited by the Commission’s regulations], see also p. 5-30 *Reliant Order* [In approving the Agreement, the Commission has determined that there was no regulation prohibiting Reliant’s trading activity at Topock and no violation of Reliant’s

blanket certificate. Therefore, with respect to Reliant's trading activity at Topock, no remedy is appropriate[.]

In addition,

Ordinarily a state's exercise of its police power is not deemed superseded under the supremacy clause . . . Defendants do not point out, nor have we found, any words in the Natural Gas Act that expressly prohibit . . . activity regarding state antitrust laws that are consistent with the federal counterparts. (citations) Nor does there appear any threatening conflict between federal and state antitrust provisions concerning conduct that the present investigation is designed to uncover; namely, 'price fixing, monopolization, divisions of markets, and restraint of trade.' Hypothetical conflict between federal law and enforcement of California antitrust provisions within the scope of the investigation, even if assumed, is not ground for preemption since it may never arise in fact. (citations) [P] Defendants argue that the sweeping and complex character of Natural Gas Act regulation implies congressional intent to exclude state antitrust enforcement or inquiry. Comprehensiveness and complexity, however, may simply reflect the intricate nature of the regulated subject matter; and no preemptive intent need be implied. (citations) . . . Since, as already explained, federal antitrust enforcement seems peripheral rather than central to aims of the Natural Gas Act, no reason appears for deeming the present inquiry into violations of California statutes that harmonize with the federal antitrust laws to be other than peripheral. Therefore there is no preemption. (*Younger v. Jensen* (1980) 26 Cal. 3d 397, 408-09)

In support of Defendants' contention that field and conflict preemption invalidate Plaintiffs' action, Defendants' cite *Public Utility District No. 1 of Snohomish County v. Dynergy Power Marketing, Inc. (Snohomish)* (S.D. Cal. 2003) 244 F.Supp2d 1072, 1080-85, aff'd 384 F.3d 756 (9th Cir. 2004) and *T & E Pastorino Nursery v. Duke Energy Trading & Mktg. L.L.C.* Nos. MDL 1405, CV-02-2178-RHW, et. al. 2003 WL 22110491 (S.D. Cal. Aug. 27, 2003) (*Pastorino*), aff'd 2005 WL 434485 (9th Cir. Feb. 25, 2005) Both *Snohomish* and *Pastorino* are federal cases that were decided under the Federal Power Act (FPA) and dealt specifically with electricity price manipulations. The *Pastorino* decision is unpublished and not binding on the Court. The parties in *Snohomish* were a wholesale electrical power company and a public utility company in the business of buying and selling electricity for resale.

Each court in *Snohomish* and *Pastorino* found the FPA gave exclusive jurisdiction to FERC in rate setting and regulation over electricity. The courts also concluded that

plaintiffs attempted to interfere with the rate setting authority vested in FERC to determine that filed electricity rates and/or tariffs were just and reasonable.

These cases are inapposite to the facts asserted in Plaintiffs' complaints. Not only are they based on electric power authorities, the FERC also provided a remedy for the wrong doing found. It is well known and often discussed that FERC determined certain parties engaged in improper trading conduct in the electricity markets. FERC investigated, made findings and provided remedies in the way of refunds for inflated electricity rates. In this action, FERC has left Plaintiffs uncompensated for the wrongs alleged.

Defendants' argument that principles expressed in the electricity cases are applicable to the natural gas market are unpersuasive. Traditionally, it was possible to apply the principles expressed in electricity cases to gas cases. However, recent "congressional enactments have resulted in changes in the rate setting structures in the natural gas and electricity marketplaces and case authority that arises from one marketplace cannot be used in another without some examination of the differences." (*E & J Gallo Winery, supra* at pp. 13:20-14:13)

The distinctions between the recent natural gas regulations and the electricity regulations are critical. "Unlike the electricity market, where FERC reviews and approves detailed tariffs filed by the PX and the ISO, at the time of the alleged misconduct in the natural gas market FERC would grant blanket approval for most sales." (*In re Western States Wholesale Natural Gas Anti-trust Litig.* (D. Nev. 2004) 346 F.Supp.2d 1123, 1136-37)

In its determination that preemption doctrines apply to challenges of market-based rates in the electricity market, *E.g., Pub. Util. Dist. No. 1 of Snohomish County v. Dynegy Power Mktg., Inc. (Snohomish)* (9<sup>th</sup> Cir. 2004) 384 F.3d 756, at 760 stated "[t]he fundamental question in this case is whether, under the market-based system of setting wholesale electricity rates, FERC is doing enough regulation to justify federal preemption of state laws." The *Snohomish* court noted that despite waiving many of the requirements under the cost-based system, FERC "continued to oversee wholesale electricity rates, . . . by reviewing and approving a variety of documents filed by the defendants, the PX, and the ISO." (*Ibid.*)

Similar to the Blanket Certificates issued for natural gas trading, electricity sellers are required "to file a market-based umbrella tariff, which 'preauthorizes the seller to engage in market-based sales and puts the public on notice that the seller may do so.'" (*Snohomish, id.*, citing, *California v. British Columbia Power Exchange Corp. (BC Power Exchange I)*, 99 F.E.R.C. 61,247, 2002 WL 32035504, 13 (May 31, 2002).

FERC also requires each electricity seller to file quarterly reports, which contain certain required information including the minimum and maximum rate charged and the total amount of power delivered during the quarter. (*Snohomish, supra*) FERC requires this information to evaluate the reasonableness of the electricity charges as required by Federal Power Act and to allow FERC to continually monitor the electricity seller's ability to exercise market power. (*Snohomish, supra, citing*, BC Power Exchange I, 99 F.E.R.C. 61,247, 2002 WL 32035504, at \*12.) In addition, FERC reviews and approves detailed tariffs filed by the PX and the ISO, which described in detail how the markets operated by each entity would function. (*Ibid.*) Each participant in the PX and the ISO markets are required to sign agreements acknowledging that the tariff filed by either the PX or the ISO would govern all transactions in that market. (*Ibid.*)

No similar regulatory oversight was in place by FERC for natural gas trading during the time period encompassing Plaintiffs' allegations. Therefore, the reasons supporting the *Snohomish* court's conclusion that preemption doctrines apply to challenges of market-based rates in the electricity market, are not applicable here. Specifically, FERC was not regulating the natural gas marketplace enough to justify federal preemption of state laws.

At the time of the alleged conduct, there were many differences between regulations in the electricity market and the gas market to apply the principles expressed in electricity cases to the circumstances surrounding the gas market in Plaintiffs' cases. In light of the above, the Court is not persuaded by Defendants' contentions that Plaintiffs claims are barred by field and conflict preemption. Thus, the Demurrers are overruled.

#### **FILED RATE DOCTRINE**

"The term "filed rate doctrine" is essentially a shorthand reference to the general rule that, where a company that is required to file a rate or tariff with FERC complies, those rates or tariffs may not be challenged in state or federal court. In other words, the filed rate doctrine is essentially a rule of jurisdiction whose applicability is circumscribed by both the congressionally-mandated jurisdiction of the regulatory agency and the occurrence of the triggering event of filing a rate or tariff." (*E & J Gallo Winery v. Encana Energy Services, Inc. et. al.*, (2004) CV F 03-5412 AWILJO, Memorandum Order and Opinion Denying Defendants' Motion to Dismiss All Claims and Denying Motion to Strike, pp. 15:14-16:1)

Because an antitrust claim may have some indirect effect on regulated activities does not trigger the doctrine if it does not implicate the rate-approval role of the agency. (*Paladin Assocs., Inc. v. Montana Power Co.*, (9th Cir. 2003) 97 F.Supp 2d 1013, 1026)

“[T]he filed rate doctrine only prevents courts . . . from adjudicating claims against natural gas retailers or wholesalers where settlement of the claim demands the court examine the filed rate in light of alleged anti-competitive conduct by the defendant and establish what the rate would have been in the absence of the conduct. (Citations) Neither FERC’s plenary powers within its jurisdiction nor the filed rate doctrine prevent actions by consumers against natural gas sellers where examination of the filed rate is not implicated.” (*E & J Gallo Winery, supra* at 9:6-16, citing *Columbia Steel Casting Co. v. Portland General Elec. Co.* (9<sup>th</sup> Cir. 1996) 103 F.3d 1427, 1446; *County of Stanislaus* 114 F.3d at 864-865; *Stein v. Pacific Bell Telephone Co.* (N.D. Cal. 2001) 173 F.Supp.2d 975, 984). Here as in *E & J Gallo Winery*, it has not be established that Plaintiffs will necessarily be required to implicate or frustrate the regulatory rate setting authority of FERC to determine the measure of damages if Plaintiffs ultimately prevail.

The Plaintiffs claims center on the natural gas “spot market” and the manipulation of trading that occurred at the border of California. Courts have stated that FERC did not regulate the natural gas “spot market” during the time of the alleged misconduct. (*In re California Retail Natural Gas and Electricity Antitrust Litigation* (2001) 170 F.Supp.2d 1052, 1059) “Plaintiffs’ complaints focus on Defendants’ behavior relative to ‘spot market’ prices and on Defendants’ allegedly conspiratorial actions in violation of California law. Neither ‘spot market’ prices nor conspiratorial conduct are regulated by the Tariff.” (*Ibid.*)

It’s true the FERC has held that a “blanket [gas] certificate has the same legal effect as the market based rate authority granted to sellers in the wholesale electric market” at issue in the above cases. (*Reliant FERC Order*, 105 FERC 61,008, at 29) However, Defendants’ reliance on Commissioner Massey’s statement in support of Defendants’ contention is taken out of context and selectively quoted. Defendants state Commissioner Massey “has noted that the FERC regulations constitute ‘tariff conditions’ and give FERC ‘the tools to sanction such bad behavior.’ (Defendants moving papers, p. 28:3-4, citing, Amendments to Blanket Sale Certificates (2003) 105 FERC 61,217, (Massey, Comm’r Concurring)

Commissioner Massey’s statements were made *after* the Commission determined there had been an abuse of trading and *after* the Commission realized it had no remedy under FERC regulations for such conduct. In approving the amendments to the Blanket Sales Certificates, Commissioner Massey stated, “the Commission *now* has the tools to sanction such bad behavior and [the Commission] give[s] notice of what some of those sanctions could be. This action should help to *restore the faith* in energy markets that has been lost in the last few years.” (Amendments to Blanket

Sale Certificates, 105 FERC 61,217 (Massey, Comm'r Concurring), emphasis added)

FERC obviously has a mechanism for filing natural gas rates for long term contracts. (15 U.S.C. section 717c) The natural gas spot market, however, cannot comply with 15 U.S.C. section 717c because the natural gas spot markets are unlike traditional long term contracts for the sale of natural gas. "The term 'spot market' is used to refer to a kind of short-term market for natural gas. . . . ('Spot markets cover sales that are 24 hours or less and that are entered into the day of, or day prior to, delivery.'). (*In re California Retail Natural Gas and Electricity Antitrust Litigation* (2001) 170 F.Supp.2d 1052, 1060, fn. 9) Therefore, 'spot market' trading of natural gas, by its nature, cannot implicate the filed rate doctrine. "To apply the filed rate doctrine in the absence of any reference to filed rates, filed tariffs, or FERC jurisdiction is to invite error by invoking a 'doctrine' as a talisman to place jurisdiction where it is not authorized." *E & J Gallo Winery v. Encana Energy Services, Inc. et. al.*, (2004) CV F 03-5412 AWILJO, Memorandum Order and Opinion Denying Defendants' Motion to Dismiss All Claims and Denying Motion to Strike, pp. 15:10-13)

In support of their position that Plaintiffs' claims are barred by the filed rate doctrine, Defendants rely on *County of Stanislaus v. Pacific Gas and Electric Company* (9<sup>th</sup> Cir. 1997) 114 F.3d 858. Defendants state "the plaintiffs alleged that the 'defendants' FERC-approved rates were the product of antitrust violations, and [sought] as damages the "overcharge" that resulted from the fixed prices. 114 F.3d at 863. The Ninth Circuit held that this type of claim is "precisely what the filed rate doctrine prohibits." (Defendants' Demurrer, p. 25:17-20)

The *County of Stanislaus* is distinguishable to the facts of this case and therefore, it is unpersuasive. The rates at issue in *Stanislaus* were the result of negotiated contracts with natural gas producers from Canada. (*County of Stanislaus, supra* at 860) The rates and terms of the contracts were scrutinized by "[s]everal levels of federal and state review." (*Ibid.*) Under section 3 of the NGA, the Economic Regulatory Commission (ERA) reviews foreign natural gas imports and must approve the transaction to ensure it is consistent with the public interest. (*County of Stanislaus, supra* at 861) Further, as noted above, the NGA requires the filing of rates with FERC to ensure the price was "just and reasonable." 15 U.S.C. 717c(c) states in part "every natural-gas company shall file . . . schedules showing all rates and charges for any transportation or sale *subject to the jurisdiction of the Commission*, and the classifications, practices, and regulations affecting such rates and charges, together with all *contracts* which in any manner affect or relate to such rates, charges, classifications, and services."

In the instant matter, the allegations concern the unregulated spot market and retail sales to consumers. The rates at issue were never filed with FERC, and there was no regulatory oversight to constitute applicability of the filed rate doctrine to market based rates as is done in electricity cases.

As discussed above, FERC was not regulating the natural gas marketplace enough to justify federal preemption of state laws, nor the application of the filed rate doctrine. Electricity cases have determined the filed rate doctrine preempts challenges to inflated rates due to improper conduct during the energy crisis because of FERC's jurisdiction over setting rates which includes sufficient regulatory oversight and management. (See: *Public Utility District No. 1 of Snohomish County v. Dynergy Power Marketing, Inc. (Snohomish)* (S.D. Cal. 2003) 244 F.Supp2d 1072, 1080-85, aff'd 384 F.3d 756 (9th Cir. 2004); *Public Util. Dist. No. 1 of Grays Harbor County Wash. V. Idacorp (Grays Harbor)* (9<sup>th</sup> Cir. 2004) 379 F.3d 641, 651-52 and *T & E Pastorino Nursery v. Duke Energy Trading & Mktg. L.L.C.* Nos. MDL 1405, CV-02-2178-RHW, et. al. 2003 WL 22110491 (S.D. Cal. Aug. 27, 2003) (*Pastorino*), aff'd 2005 WL 434485 (9th Cir. Feb. 25, 2005).) No such determination has yet been made regarding the natural gas spot markets.

As in *Snohomish*, the court in *Grays Harbor* also applied the filed rate doctrine to the market based rates set in the electricity markets. *Grays Harbor's* determination was based on the same reasoning as in *Snohomish*. *Grays Harbor* stated "the market-based rate regime established by FERC continues FERC's oversight of the rates charged. FERC only permits power sales at market-based rates after scrutinizing whether 'the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry.' According to FERC, these conditions assure that the market-based rates charged comply with the FPA's requirement that rates be just and reasonable. (Citations) This oversight is ongoing, in this case requiring Idaho Power Company to provide notice of any change in status, to file an updated market analysis every three years, and to file various sales agreements and transaction summaries. . . . FERC has clearly stated its belief that these procedures 'satisfy the filed rate doctrine for market-based rates'." (*Grays Harbor, supra* at 651-52) Since FERC had no similar regulatory oversight in place for the natural gas markets at the time of the alleged misconduct, the filed rate doctrine is inapplicable to Plaintiffs' claims in this instance.

Finally, Plaintiffs correctly point to *Cal. ex rel. Lockyer v. FERC* (9<sup>th</sup> Cir. 2004) 383 F.3d 1006, a federal electricity case that discusses the filed rate doctrine. It is instructive here because the discussion on the filed rate doctrine specifically addresses analogous flaws in the regulatory aspects of the natural gas market. *Cal. ex rel. Lockyer* states "a market-based tariff cannot be structured so as to virtually deregulate an industry and remove it from statutorily required oversight. The

structure of the tariff complied with the FPA, so long as it was coupled with enforceable post-approval reporting that would enable FERC to determine whether the rates were "just and reasonable" and whether market forces were truly determining the price." *Cal. ex rel. Lockyer also states* "because the reporting requirements were an integral part of a market-based tariff that could pass legal muster, FERC cannot dismiss the requirements as mere punctilio. If the ability to monitor the market, or gauge the 'just and reasonable' nature of the rates is eliminated, then effective federal regulation is removed altogether. Without the required filings, neither FERC nor any affected party may challenge the rate. Pragmatically, under such circumstances, there is no filed tariff in place at all." (*Cal. ex rel. Lockyer v. FERC* (9<sup>th</sup> Cir. 2004) 383 F.3d 1006, 1014-1017)

### NO REMEDY

As to Plaintiffs claims relating to unregulated conduct and conduct arguably regulated by FERC, the Court is also guided by the policies expressed in *Schmoeger v. Algonquin Gas Transmission Co.* (1992) 802 F.Supp.1084.

In *Schmoeger*, claimants brought an action against the gas company and challenged the allegedly improper expansion of the activities of a gas compressor facility. The gas company brought a motion for summary judgment and argued that the claimants were barred from collaterally attacking the certificate issued to it by the FERC because the claimants did not object or intervene in the FERC proceeding during which the certificate was issued.

The claimants also asserted the gas company went beyond the authority granted to it by the FERC because it operated the facility improperly. Ultimately the court ruled against claimants. However, the court acknowledged claimants' allegation constituted an attack beyond the gas company's right to implement its FERC-approved certificate. The *Schmoeger* court stated "[I]n such circumstances, depending on the facts involved, specific relief sought, and legal doctrines applicable, recourse may be available (a) from FERC, (b) from this court, or (c) in state courts." (*Schmoeger v. Algonquin Gas Transmission Co.* (1992) 802 F.Supp.1084, 1086) Citing *Silkwood v. Kerr-McGee Corp.* (1984) 464 U.S. 238, the court further noted "where a regulated entity goes beyond performing pursuant to the specific authority granted and operates a facility improperly, an injured party may be entitled to pursue state law claims, if the same relief is not available under the particular circumstances from the agency." (*Ibid.*) The court concludes "it would be 'difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.' . . . Thus, nuisance and similar common law remedies may be available in such a case, 'but these must be for wrongs, as in *Silkwood* . . . (*Ibid*, quoting *Silkwood* at 251, citations omitted)

In *Schmoeger* the court found claimants failed to point to any specific wrong doing by the gas company.

FERC has determined that manipulation of natural gas prices contributed to the energy crisis through improper trading practices as alleged by Plaintiffs. FERC recognized the conduct was not the result of a competitive market, but that FERC had no explicit prohibitions against the improper conduct. FERC then concluded a remedy was inappropriate.

This case is analogous to *Schmoeger* since the improper trading went beyond the authority granted to Defendants by the FERC to sell, transport, and trade natural gas in the newly deregulated market. As acknowledge by FERC, remedies under FERC regulation were deemed inappropriate because FERC had no prohibitions against the misconduct at the time. As a consequence, there are no remedies for Plaintiffs under FERC, and Plaintiffs are left to pursue their state remedies for the wrongful conduct.

Defendants' point to two FERC orders in support of their argument that FERC provides a remedy for the alleged misconduct: (1) *Amendments to Blanket Sales Certificates*, 105 FERC P 61,217 (2003), 107 FERC P 61,174 (2004) and (2) *Order Amending Market-Based Rate Tariffs and Authorizations* 105 FERC P 61,218 (2003); 107 FERC P 61,175 (2004). These orders incorporated the new code of conduct implemented with and made conditional on all natural gas marketers, sellers, and traders. One order primarily dealt with natural gas and the other mirrored the first, but related to the electricity markets. Defendants contend these orders establish, the FERC has the ability to remedy these types of wrongs, and therefore, FERC exercises exclusive jurisdiction over the transactions at issue. (See Defendants' discussion at pp. 16:7-17:2 of Defendants' moving papers.)

Everything Defendants argue in this regard is true, and the 2003/2004 orders will provide remedies for improper trading conduct in the future. The Orders however, as discussed above, leave Plaintiffs without recourse for the damages Plaintiffs allegedly suffered prior to the investigation and findings of FERC concerning the price manipulations at issue in the complaint. It would be unjust to preclude Plaintiffs from the opportunity to remedy these wrongs because FERC failed to anticipate and provide for the type of conduct used to manipulate the natural gas markets.

#### **DEFENDANTS RELIANT AND ZANABONI'S MOTION TO STRIKE**

Defendants Reliant and Zanaboni contend Plaintiffs' claims relating to "churning" are preempted because the FERC has already addressed this specific issue. (See 105 FERC section 61,008 (2003) (*Reliant FERC Order*).) It's true FERC reviewed the

trading practices of Reliant and the Commission found “Reliant profited from churning in both the physical and financial markets. In doing so, Reliant adversely impacted prices to such a significant degree that remedial action is justified. . . .” However, FERC concluded there was no regulation prohibiting Reliant's trading activity at Topock and no violation of Reliant's blanket certificate. Therefore, with respect to Reliant's trading activity at Topock, no remedy is appropriate.” (105 FERC section 61,008, *supra*, citing, FERC, *Final Report on Price Manipulation in Western Markets*, March 2003, pp. II-60-II-61)

Again, FERC left Plaintiffs with no remedy for the improper trading practices of Reliant. Consequently, the Court denies Defendants’ motion to strike allegations of Reliant’s churning and overrules the demurrer in this regard.

Moving Defendants are directed to file an Answer within ten days of the Court’s ruling.